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# SHOULD HATE SPEECH BE CONSTITUTIONALLY PROTECTED?

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SHOULD HATE SPEECH BE CONSTITUTIONALLY PROTECTED?

By

Leonard Simpson

B.S., Southern Illinois University, 2013

A Research Paper

Submitted in Partial Fulfillment of the Requirements for the  
Master of Science

Department of Media Arts and Mass Communications  
In the Graduate School  
Southern Illinois University Carbondale  
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Research Paper APPROVAL

SHOULD HATE SPEECH BE CONSTITUTIONALLY PROTECTED?

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Leonard Simpson

A Research Paper Submitted in Partial

Fulfillment of the Requirements

For the Degree of Master of Science in Professional Media and Media Management

Approved by:

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## INTRODUCTION

This research examines why hate speech towards minority groups, or individuals is constitutionally protected, while defamatory speech towards individuals is not protected by the First Amendment of the Constitution. There are laws prohibiting racial and sexual harassment in an education setting or workplace environment, as well as libel and slander laws that punish defamation of someone's character. Defamation, like hate speech, can originate from a place of hate. Why isn't hate speech automatically considered unprotected speech under the First Amendment, just like defamation?

Not all hateful speech is protected, in *Chaplinsky v. New Hampshire* (1942), "fighting words" were considered unprotected by the First Amendment. The Court said fighting words were those, "which by their very utterance inflict injury" and which "are no essential part of any exposition of ideas." The decision defined the limits of free speech when harmful speech could cause a breach of the peace. The Court could have extended *Chaplinsky* to harmful speech across racial, ethnic and religious lines. (Bleich, 2011, p. 922). Another prominent case recognizing a First Amendment exception for speech targeting a race was *Beauharnais v. Illinois* (1952) where the Supreme Court said that group libel statutes were constitutional. The White Circle League of America's leader was convicted for passing around literature calling for the rapes, robbery, guns, knives, and marijuana of the Negro. Unfortunately, in the immediate aftermath of the case little was done in Congress to advance the actions of the Court into a federal statute (Bleich, 2011, p. 922).

In addition, Title VII of the Civil Rights Act of 1964 makes a racially or sexually hostile workplace illegal. Title IX of the Education Amendments of 1972 makes a

sexually hostile education setting illegal, and Title VI of the Civil Rights Act makes a racially hostile education environment illegal.

In addition, in 2009 Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act making it a federal crime to assault or kill a person with a clear racial motivation. The law also expanded federal hate crime law to apply to crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.

This paper argues that hate speech is not worthy of protection, just like the fighting words of *Chaplinsky*, the group libel of *Beauharnais*, the hostile employment and educational environment outlawed by the nation's civil rights laws and the hate crimes outlawed by the Matthew Shepard and James Byrd, Jr Act. Hate speech encompasses no "essential part of the exposition of ideas." (*Chaplinsky*) Hate speech inflicts harm on those who it is aimed at, and, as the Court says, is "of such slight social values as a step to the truth than any benefit that may be derived...is clearly outweighed by the social interest in order and morality." (*Beauharnais*). Hate speech serves no intellectual purpose in advancing society.

### **Literature Review**

European democracies have been stricter in passing and enforcing hate speech than the United States. Some European countries have enacted laws to ban hate speech completely, because it causes more harm than good for society and after witnessing what hate speech can do during the rise of the Nazi Germany and World War II. But American courts have taken a more absolutist approach, believing that if such speech is

curtailed it could negatively impact our civil liberties. They protect speech even if it may be harmful to a person's dignity, character, or livelihood.

### **Europe:**

There has been a tradition of freedom of expression and opinion in America. Thomas Jefferson, James Madison, Thomas Paine, and Oliver Wendell Holmes, were influenced by European philosophers, like John Stuart Mill and John Milton who believed in the cultivation of the intellect unfettered by government would result in significant contributions to society. They believed speech was a powerful tool that could be used to motivate people to affect change whether it be against an absolutist monarchy or a new nation founded on liberal principles of equal speech amongst the populace. In John Milton's own writings specifically *The Aeropagitica*, he discusses why the truth will win out against falsehood on the battlefield between good and evil. What Milton is saying is that ideas need to be debated by both sides, so that freedom will prevail (stlawrenceinstitute.org). According to John Stuart Mill's own writings in 1859, who believed that it was ethical to express oneself even if someone else thought it was immoral. Mill said, "I may disapprove of what you say, but I will defend to the death your right to say it" (Bleich, 2011, p. 917). However, speech can have limitations and Mill also had a 'harm principle', which had guidelines that by law would limit expression around permissible speech.

Justice Oliver Wendell Holmes Jr., first expressed the "marketplace of ideas" in his dissent in *Abrams v. United States* (1919). As part of the freedom of expression Holmes, following in the tradition of John Stuart Mill, believed the truth will emerge from the competition of ideas in a free and open democracy.

When it comes to racist speech and opinion Europe, particularly Western Europe there have been constraints on speech involving racism. Incitement to racial hatred along with Holocaust denial laws have been passed in European countries to limit Anti-Semitic beliefs, but in the United States we have continued to examine the First Amendment and the protections it affords to racist speech (Bleich, 2011, p. 918).

Of course Europeans didn't magically come to the conclusion that hate speech should be made illegal because of the racial, ethnic, and religious divisions it caused. There were Anti-Semitic newspapers and books in Germany during the Weimar Republic along with the Third Republic France. Some in the British Parliament tried to outlaw racist speech in 1936 on the purposed grounds to racial or religious prejudice, mostly to combat against Oswald Mosely's British Union of Fascists (Bleich, 2011, p. 919). The MPs' were against the law, because they believed it would forbid criticism of the church and that of Germany and France, which could cause prejudice towards Germans and French 'races'. Ultimately, the U.K. Attorney General struck down the proposed bill citing neutral, catch-all language banning incitement to disorder was in keeping with legal precedent. The language regarding racial and religious incitement encompassed narrow wording that was too limiting (Bleich, 2011, p. 919).

Even in the early 60s when Conservatives' were in power in the United Kingdom they fought against reforms to pass laws against racial incitement despite the fact that 430,000 citizens signed a petition wanted such action. Well, elections have consequences and the 1964 election brought the Labour Party into power and with it reforms using the proposed law as a tool for integration for immigrants. Their argument was to prevent first and second class development amongst the citizens, which could

allow inequality from one group to another and incite feelings of hatred between various ethnic and racial groups. The 1965 Race Relations Act, specifically Sec. 6, made it illegal to intentionally use threatening, abusive, or insulting language likely to stir up hatred against sections of the British public on the grounds of colour, race, or ethnic/national origins (Bleich, 2011, p. 919). Additionally, the 1986 Public Order Act extended protection to groups defined by nationality and eased requirements in proving transgressions by eliminating the need for intent and likelihood to express in utterance.

In England, during the 1960s after the Labour Party became the party in power in government, Home Secretary Frank Soskice helped pass a law against racial incitement (Bleich, 2011). Soskice's reasoning was to help assimilate immigrants into British society, by allowing immigrants to feel like first-class instead of second-class citizens and alleviate feelings "other" from Christian Englishmen toward racial, ethnic, and religious minorities.

After debate in the House of Commons with staunch opposition by the Conservative Party who were holding up bills and debates in a very similar style to the Southern Democrats use of the filibuster during the Civil Rights Era in the United States; Parliament passed the 1965 Race Relations Act. (Section 6) rendered it illegal to intentionally use threatening, abusive or insulting language likely to stir up hatred against sections of the British public on the grounds of colour, race, or ethnic/national origins (Bleich, 2011). After WWII Germany had enacted laws prohibiting Nazi rhetoric and symbols, because they could undermine democracy, as well as using phrases and symbols, like "Heil Hitler!", or flying Nazi flags, especially with swastikas. Laws passed and made it illegal to incite hate, advocate violence, insult, and ridicule or defame



minorities in the populace, because of the breach of public peace (Stein, 1986).

According to Bleich, most European democracies began passing hate speech laws targeted at racism and religious intolerance in the 60s and 70s.

Anti-Semitism was rampant in Germany and France prior to WWII. Anti-Semitic books and stories in newspapers did not hide their feelings of prejudice towards a religious minority.

In Germany, Parliament unanimously passed a law citing hate speech and racist rhetoric only served to undermine the democratic order in 1960. Expression of racism was not tolerated and the government banned Nazi rhetoric and symbols including, flags, swastikas, the 'Heil Hitler!' salute, and prohibited National Socialist propaganda (Bleich, 2011, p. 920). The German government unanimously voted to reform Article 130 of their criminal code making it illegal to incite hatred, provoke violence, insult, and ridicule, or defame in a manner apt to breach the public peace.

In Germany and Austria if anyone walks down the street goose stepping, raising their arm to salute Hitler, or anything that could be perceived as racist that harkens back to that dark time in Europe one could be arrested on the spot whether or not your actions were intentional, or if you were “just joking” and were intoxicated. Austria and other European countries have passed laws forbidding Holocaust denial, downplay the damage it created, or make excuses to why it even happened (Bleich, 2011, p. 917). This is a controversial step that some see as a limit on free expression. In 2006 British historian David Irving was convicted for stating there were no gas chambers at Auschwitz, and Hitler had tried to protect Jews not murder them, and that *Kristallnacht* (Night of Broken Glass, against Jews throughout Nazi Germany and Austria on 9–10

November 1938, carried out by SA paramilitary and non-Jewish civilians) was carried out by agitators dressed as Nazis instead of by the Nazi party.

France only passed anti-racism laws in 1972, there had been efforts and political pressure for years, but prominent politicians argued that legislation regarding racial incitement was unnecessary. Fortunately, Jean Foyer, Chairman of the National Assembly Law Committee realized racist-inspired acts occurred and there should be specific punishments against it (Bleich, 2011, p. 920).

### **U.S. Cases:**

The U.S. has protected people's rights to utter hate speech with the protection of the First Amendment. When particular speech has zero value in the education or worth of our society does it truly deserve a place amongst civilized human beings who may be disgusted by public displays of language and symbols that could defame, or injure a person? What value does it have for democracy?

"Fighting words" those which by their very utterance inflict injury or tend to incite an immediate breach of the peace was the defining moment in *Chaplinsky v. New Hampshire* (1942). Walter Chaplinsky, a Jehovah's Witness, was passing out pamphlets on a public sidewalk and called organized religion a "racket." People gathered around which caused a public disturbance, and a police officer, who already warned Chaplinsky to keep the noise down approached Chaplinsky again, which resulted in Chaplinsky verbally assaulting the police officer calling him a "God-damned racketeer" and "a damned fascist" in a public place. He was arrested and convicted under a state law for violating a breach of the peace (*Chaplinsky*). The U.S. Supreme Court ruled that Chaplinsky violated the state statute, which prevents intentional offensive speech being

directed at people in a public place. Chaplinsky believed the statute violated his First and Fourteenth Amendment rights to free speech, but Justice Frank Murphy, writing the opinion of the Court said, “well-defined and narrowly limited” categories of speech fall outside the bounds of constitutional protection.

Thus, “the lewd and obscene, the profane, the slanderous,” and (in this case) insulting or “fighting” words neither contributed to the expression of ideas nor possessed any “social value” in the search for truth (*Chaplinsky*). The Court ultimately found that free speech is not absolute under all circumstances. There can be cases when speech is narrowly defined and the New Hampshire statute was found to be narrowly tailored to punish specific conduct, in this case “fighting words”, so the Court held that the statute was not unconstitutional towards the right of free speech, therefore, this is content based restriction applied in a narrow circumstance.

The landmark group-libel case *Beauharnais v. Illinois* (1952), punished statements aimed at racial and religious groups that would expose ‘the citizen of any race, colour, creed or religion to contempt, derision or obloquy or which is productive of breach of the peace or riots’ (Bleich, 2011, p. 922). Joseph Beauharnais was president of the White Circle League, Inc. and he was arrested for passing out leaflets asking the mayor and city of Chicago “to halt the further encroachment, harassment and invasion of white people...by the Negro.” Beauharnais was found guilty of violating an Illinois statute making it illegal to distribute any publication that “exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy.” Justice Frankfurter authored the opinion of the Court, which concluded that his speech consisted of libel and beyond constitutional protection.

In *Brandenburg v. Ohio* (1969), Brandenburg was the KKK leader who made a speech at a KKK rally calling for the use of violence to achieve political reform. Brandenburg was convicted of violating an Ohio criminal syndicalism law, which made advocating the use of violence, sabotage, and terrorism tactics for achieving political reform unlawful, and assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." In a *per curiam* opinion, the Court ruled that Brandenburg's free speech was violated, but also said speech can be prohibited if it "directed at inciting or producing imminent lawless action," and it is "likely to incite or produce such action." The Ohio statute was found to be overly broad, because the law was not clear if teaching and advocacy of doctrines would actually incite imminent lawless action, thus making the statute unconstitutional.

In *Collin v. Smith* (1978), a case involving members of the American Nazi Party wanted to march in a parade in Skokie, ILL, a suburban city of Chicago where there is a considerable Jewish population with some Holocaust survivors. The group wished to express themselves by proclaiming white supremacy and anti-Semitism, but the city council blocked the Nazis from marching with ordinances, however; the Nazis sued in federal court citing content-based regulations.

In the opinion of the Seventh Circuit Court, Judge Pell stated, "that the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises" (*Collin*). Judge Sprecher who dissented in part and concurred in part, addressed the complex issue of members of the Jewish community feeling they were being inundated with fighting words, group libel, and hostile audience

if the march occurred. Sprecher believed that there might be need for the government to balance these situations regardless of a prior restraint on the demonstration by the Nazis to have empathy with groups of people that have experienced historical attitudes of hate.

In *Texas v. Johnson* (1989), Greg Johnson was burned the American flag outside city hall in Dallas as a means of protest against the Reagan administration. Johnson was convicted under a Texas statute, which outlawed flag desecration and he was sentenced to a year in jail and fined \$2,000. In a 5-4 decision, the Court held that Johnson's flag burning was protected as expression under the First Amendment. His conduct was found to be political in nature, and if an audience found the expression of his ideas offensive, the state cannot justify their statute prohibiting speech. Justice William Brennan wrote for the majority, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (*Johnson*). The Court rejected the argument that (*Brandenburg*) should be applied here, because there was no "breach of the peace," or "imminent lawless action" in Johnson's flag burning and Texas already had statutes that violated "breaches of the peace" directly.

In *R.A.V. v. City of St. Paul* (1992), the U.S. Supreme Court heard a case involving a St. Paul ordinance punishing the placement of certain symbols that were "likely to arouse anger, alarm, or resentment on the basis of race, religion, or gender." One teen had violated the ordinance by burning a cross on an African-American family's yard. The Court, in an opinion by Justice Scalia, reversed (*R. A. V.*'s) conviction on the ground that the ordinance unconstitutionally criminalized some hurtful expression

(specifically that aimed at racial and religious minorities) and no other hurtful expression (that aimed at other unprotected groups) based on the political preferences of legislators. Scalia makes clear that "fighting words" is not, as *Chaplinsky* had suggested, a category of speech that is wholly outside of First Amendment protection. Scalia's reasoning is based on how a reasonable person would feel about the burning of a cross, and not how a more sensitive person would feel.

However, the next year in *Wisconsin v. Mitchell* (1993), a Wisconsin statute imposed stiffer sentences for racially-motivated assaults than for other types of assaults. Mitchell, a young black man started a fight with a young white man, and the Kenosha County court ruled the increase in fines were justified because he selected his victim because of his race. Mitchell argued that the statute violated his First Amendment rights. The U.S. Supreme Court, in a unanimous opinion, reasoned that the statute did not violate the First Amendment because it paralleled antidiscrimination laws that comply with the First Amendment. The statute was aimed primarily at regulating conduct, not speech.

In *Virginia v. Black* (2003), the Court was divided on the question of whether a state could prohibit cross burning carried out with the intent to intimidate. They concluded in a plurality decision that, because cross-burning has a history as a "particularly virulent form of intimidation," Virginia could prohibit that form of expression while not prohibiting other types of intimidating expression. The Court found the cross-burning statute to fall within one of *R. A. V.*'s exceptions to the general rule that content-based prohibitions on speech violate the First Amendment. The Court seems to find issues back and forth regarding content versus conduct, versus context when dealing

with issues of hate speech (both spoken and symbolic) on a case-to-case basis (*Virginia*).

However, the Court believed that the family in (*Virginia*), *was* actually threatened because the three individuals violated the Virginia statute making it a felony "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place," and specifies that "any such burning...shall be *prima facie* evidence of an intent to intimidate a person or group," (*Virginia*).

Justice Clarence Thomas wrote in his dissent that cross burning should be a First Amendment exception, as others have argued regarding flag burning (*Johnson*). The statute, "prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point" (*Virginia*). Thomas is saying that cross-burning is a different act of a hate crime, and the special nature of conduct of cross-burning is analogous to Nazi swastikas, flags, symbols and rhetoric in Europe. Justice David Souter wrote that cross-burning, even with intent to intimidate, should not be a crime under the precedent set in *R.A.V.*

In *Snyder v Phelps* (2011), the Supreme Court overturned a jury verdict against a Kansas-based anti-gay church group that picketed the funeral of a marine who died on duty in Iraq. (The group believes that soldiers' deaths are a form of punishment against America for tolerating homosexuality). A Maryland jury had found that the picketing and Internet postings by the group targeted the soldier's parents and constituted intentional infliction of emotional distress. Chief Justice Roberts noted that the Westboro Baptist

Church group's speech generally related to a matter of public concern, that the group complied with all city ordinances and police department requests, and that the funeral itself was not disrupted. However; Justice Alito dissented, arguing that at least some of the group's speech directly attacked the Snyder family and therefore did not relate to a matter of public concern. "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case" (*Phelps*).

### **Statutes punishing hate crimes:**

The Civil Rights Act of 1964 allows federal prosecution of anyone who "willingly injures, intimidates or interferes with another person, or attempts to do so, by force because of the other person's race, color, religion or national origin." Persons violating this law face a fine or imprisonment of up to one year, or both. If bodily injury results or if such acts of intimidation involve the use of firearms, explosives or fire, individuals can receive prison terms of up to 10 years, while crimes involving kidnapping, sexual assault, or murder can be punishable by life in prison or the death penalty (18 U.S.C. Section 245).

Title VII of the Civil Rights Act, prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin, it also applies to an individual associating with another individual from one of the above groups (CRA, 1964). Title VI declares that programs and activities receiving Federal financial assistance may not discriminate on the grounds of race, color, or national origin. Title IX of the Education Amendments of 1972, prohibited discrimination under any education program or activity receiving federal financial assistance.

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act



expanded the 1969 federal hate crime law, which criminalized actions against individuals because of their race, color, gender, or national origin (18 U.S.C. Section 245 (B)(2)). The Shepard-Byrd statute included crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability. Shepard was a gay student who was tortured and murdered for his sexuality, and Byrd was an African-American man who was dragged behind a truck, which resulted in his decapitation, both crimes occurred in 1998. The statute removes the prerequisite that the victim be engaging in a federally protected activity, like voting or going to school; gives federal authorities greater ability to engage in hate crimes investigations that local authorities choose not to pursue; provides \$5 million per year in funding for fiscal years 2010 through 2012 to help state and local agencies pay for investigating and prosecuting hate crimes; requires the FBI to track statistics on hate crimes based on gender and gender identity (statistics for the other groups were already tracked) (Trout, 2015, p. 13).

The recent Oklahoma fraternity case, where two students were expelled for singing a virulently racist song on a fraternity bus, involves a clash between free speech and the obligation of universities to ensure under the federal civil rights laws that they are acting affirmatively create an educational environment free of racial hostility. Feldman argues that public universities are organs of the state and are akin to government, and universities are meant to be communities of learning that require decorum and are more restrictive than the public square. Insults, screaming, and denouncing someone may be protected by the First Amendment, but said speech doesn't belong in a classroom (*Bloombergview.com*). The fraternity can be banned for discrimination, which is conduct, but speaking in favor of discrimination is protected

speech. However, David Boren, President of the University of Oklahoma, said he expelled the students for their “leadership role in leading a racist and exclusionary chant, which has created a hostile educational environment for others.” This goes back to Civil Rights laws, especially Title VI, which prohibits a racially hostile education environment.

Mr. Boren has said the students were expelled because their speech was a form of discriminatory conduct that created a hostile educational environment for African-American students. Having pledges repeat a chant not admitting an African-American is racial discrimination and by expelling the two chant leaders from campus fulfills the educational goal of maintaining a non-hostile education environment (*Bloombergview.com*). If in the workplace co-workers said blacks were unqualified for the job it would be considered discriminatory speech under Title VII, however, in public the speech would be protected as opinion, but at work it is discriminatory conduct in the form of speech.

The law doesn’t ban speech; it bans the act of discriminating. And when laws are aimed at conduct that incidentally burdens speech, the courts don’t subject them to the same strict scrutiny they apply to laws directed primarily at speech (*Bloombergview.com*). The school is performing their legal obligation to provide a non-hostile educational environment by prohibiting racially hostile conduct.

Many First Amendment scholars argued, however that the president of the university violated the students’ free speech rights by expelling them. Hate speech is protected by the First Amendment so a state university cannot expel a student for hateful expression, especially when it is off-campus. (Volokh)

**Opposition to Hate Crime Statutes:**

Some people question why have hate crime laws all when hate crime involves a separate crime punishable by existing law? Justifications for enforcing hate crimes separately is because the motivation of hatred, bias, or prejudice, the moral culpability of the wrongdoer is greater than that of a person who commits a crime without that motivation. Therefore the punishment ought to be proportionally greater (Trout, 2015, p.131). Hate crimes target a community and not just a single individual, when someone is attacked because of particular characteristics it sends fear inside that members of that particular community. Moreover, existing criminal statutes have been ineffective at deterring hate crimes perpetrators, so additional deterrence is needed (Trout, 2015, p.131).

The opponents of hate crime statutes claim that existing laws are good enough to combat crime; they claim that hate crime laws give more protection to certain groups of people that everyone cannot enjoy equally; they contend that hate crime laws are inefficacious, perhaps even counter-productive by provoking retaliation against protected groups, and opponents often raise First Amendment constitutional challenges to hate crime laws, arguing that valid speech against certain groups is suppressed or chilled by hate crime legislation (Trout, 2015, p. 131).

Hate crime statutes raise a complicated set of First Amendment concerns, and potentially rely on impermissible content-based distinctions. However, Shepard-Byrd avoids these complications, because it does not extend to threats, and all First Amendment challenges have so far been unsuccessful (Trout, 2015, p. 131).

A group of pastors sued in an attempt to enjoin enforcement of the Shepard-Byrd

Act over the First Amendment. The Sixth Circuit upheld the District Court's dismissal for the pastors' lack of standing citing that the plaintiffs haven't shown an intent to violate the Act, or prove to have shown sufficient evidence they would be subjected to adverse law enforcement action. Since the case was resolved on standing grounds it shows that First Amendment concerns were overblown and that limiting the Act to bodily injury precludes any valid First Amendment problems (Trout, 2015, p. 131).

James Dobson, founder of Focus on the Family, a socially conservative group, opposed the Shepard-Byrd law saying it would "muzzle people of faith who dare to express their moral and biblical concerns about homosexuality" (*nytimes.com*). In the House version of the bill, H.R. 1592, there is a rule called the "Rule of Construction", which specifically provides that "Nothing in this Act...shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the free speech or free exercise clauses of the First Amendment (H.R. 1592).

Brian Walsh, senior legal fellow at The Heritage Foundation, writes that the HCPA (Hate Crimes Prevention Act of 2009, or Shepard-Byrd Act) would federalize violent, non-economic conduct that is truly local in nature and have little or no federal nexus (*theheritagefoundation.com*). He claims Congress lacks the constitutional power to create the HCPA, and state law enforcement would be hindered by the statute. He makes clear that racially motivated violence is repugnant, but the Fourteenth Amendment provides equal protection under the law and there is no evidence that states don't enforce civil and criminal laws unevenly. Also, he mentions that 45 of the 50 states have passed "hate crimes" statutes responding to violence and intimidation based on bias.

Walsh continues to say that the HCPA is too broad regarding "hate crimes" and doesn't require the government to prove that the accused was motivated by bias, prejudice, or hatred. 44 of the 45 states already have stringent penalties on violent acts related to race, religion, or ethnicity, and 31 states do so for violence toward individuals regarding sexual orientation ([theheritagefoundation.com](http://theheritagefoundation.com)). Walsh further argues that the Constitution doesn't grant Congress or the federal government general police power, therefore, Congress doesn't have the power to criminalize the majority of violent, non-economic activity inside the principal criminal offenses in the Act. Congress's Commerce Clause power is an insufficient argument. The HCPA applies to anyone who, "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person." This violent, non-economic activity does not involve interstate commerce ([theheritagefoundation.com](http://theheritagefoundation.com)).

All crime is punishable by the government of every state, regardless of the motivation of the accuser or the victim's identity. Almost all states have adopted some kind of "hate crime" statute, which under the Constitution doesn't exceed their (the states') authority to criminalize violent, non-economic activity that remains local in nature.

### **Yong vs. Taylor:**

Caleb Yong and Robert S. Taylor, have different views and approaches about how hate speech should be regulated, if at all. Yong favors specific categories of hate speech that can and should be regulated by government, while other types of hate speech are protected. Taylor is more concerned about civil libertarian protections on

speech is best for democracy except for very narrow circumstances. Taylor believes that the priority of liberty is paramount and hate speech as Yong has defined it is against the priority of liberty and civil libertarian values. Only very narrowly defined terms of hate speech such as “face-to-face vilification” by means of “fighting words” or as “hostile-environment harassment” (Taylor, 2012, p. 354) should be restricted.

Yong dismisses 'nihilist' positions on free speech and believes in a principle based in political morality, what he calls the Free Speech Principle (FSP), based on a liberal conception of justice. Yong differs from Taylor on what Taylor calls ‘group libel.’ According to Yong, ‘group libel’ is unprotected speech under what he calls the Free Speech Principle (FSP), because it designates false assertions that hold up to ridicule or contempt, or bring into disrepute, a racial or religious group (Yong, 2011, p. 401-402). Given the highly controversial and evaluative nature of the question of how a group should be characterized (Yong, 2011, p. 402). Taylor defines hate speech as a type of group libel: speech (oral or written) that argues for the mental, physical, and/or ethical inferiority as undermining fair equality of opportunity for members of particular historically-oppressed groups (e.g., blacks, women, Jews, and homosexuals) (Taylor, 2012, p. 353-354).

Yong believes that the term hate speech is a broad designation to usefully analyze a single category that includes different kinds of speech acts that involve different kinds of free speech interests and can cause very different kinds of harm (Yong, 2011, p. 385). Therefore, he classified four different categories of what constitutes hate speech: (1) targeted vilification, (2) diffuse vilification, (3) organized political advocacy for exclusionary and/or eliminationist policies, and (4) other

assertions of fact or value, which constitute an adverse judgment on an identifiable racial or religious group (Yong, 2011, p. 386). Yong believes the FSP to be a distinct principle, which goes beyond a general principle of negative liberty such as that defended by Mill (Yong, 2011, p. 387).

Yong argues that speech unprotected by the First Amendment is regulable. Regulable speech can be regulated or restricted through legal and institutional means without violating the First Amendment, or Yong's FSP (Yong, 2011, p. 388). Even though some forms of hate speech is regulable and should be restricted, Yong is concerned that government legislation restricting hate speech could give authority figures over-breadth in their powers when regulating speech (Yong, 2011, p. 389). He cites crimes like perjury, bribery, insider trading, solicitations to commit crimes are is unprotected speech by the First Amendment, and it is simple to show harm towards society. Institutions such as law enforcement and the courts can regulate such speech when needed.

Targeted vilification is unprotected speech and uncovered by the FSP, diffuse vilification and organized political advocacy for exclusionary and eliminationist policies is unprotected speech, and that other assertions of fact and value, including so-called group libel, are protected hate speech (Yong, 2011, p. 402).

Yong does not place special weight on the difference between speech and conduct. He believes hate speech covered by the FSP garners greater protection from legal restrictions (Yong, 2011, p. 387). Nevertheless, he argues that some hate speech, consistently with the FSP, cannot be restricted or regulated. Hate speech is unprotected when there are clear, compelling interests that cause serious harm to the

intended hearer, or society even if the speech advances some of the interests and values covered in the FSP (Yong, 2011, p 388). Defamatory speech should be restricted, because it is intended to be intentionally harmful. He finds that some forms of hate speech are regulable, however, he is concerned that government legislation restricting hate speech could give authority figures over-breadth in their powers when regulating speech. (Yong, 2011, p. 389).

Targeted vilification is uncovered by the FSP and unprotected speech, because it does not promote any free speech interests and its regulation would not violate any free speech rights. According to the FSP, this form of hate speech is regulable (Yong, 2011, p.396).

Diffuse vilification differs from targeted vilification inasmuch as it is not directed at specific individuals or small groups, but is directed either (partly) to a sympathetic public audience, or at a wide and indeterminate audience (Yong, 2011, p. 396). Most often this is expressed as symbolic speech, and one example we had covered earlier in this paper, *Collin v. Smith* (1978). The speech may be used to wound, insult and intimidate people of a certain group, but said group may not be the intended audience but just bystanders. A Nazi march is political speech at some level, and regulating diffuse vilification could violate the speaker or audience right to autonomy (Yong, 2011, p. 397). Diffuse vilification cannot be regulated and is considered covered, protected speech under Yong's FSP, because the speech doesn't cause harm when attempting to recruit supporters to discriminatory points of view. Yet, it acts through a direct intervention in the public domain sending public signals to targets, but when the law tries to control this harm it operates simply by attempting to disable the ability to send such public signals; it



does not attempt to influence the ways in which agents are able to propagate or access certain views (Yong, 2011, p. 398).

Organized Political Advocacy for Exclusionary and Eliminationist policies are covered as political speech, but also unprotected which makes it regulable.

Exclusionary policies exclude racial and religious groups from full and equal citizenship by stripping them of their civil and political rights. Eliminationist policies are used to remove racial or religious groups from the population through forced repatriation or ethnic cleansing (Yong, 2011, p. 398). Governments could be convinced by the people or vice-versa to enact such policies that would be extremely harmful. These situations have happened before with Nazi Germany, Sri Lanka, Rwanda, Kosovo, and more recently Sudan (Darfur). The argument from truth discovery seems to me to be inapplicable here: the FSP, I take it, is important only within a larger commitment to liberal justice, and such a commitment will discount the possibility that claims which support the violation of foundational principles of liberal justice are true (Yong, 2011, p. 398).

Participation in democratic self-government strongly protects political speech, but this category of hate speech offers no clear grounds for protection in an open democracy, however, regulation of this type of hate speech is legitimate for regulation. Political equality is crucial to the FSP and political advocacy and organization could result in electing an anti-democratic government. How can one value democracy even if it means some elected may call for burning down the government and may advocate exclusionary and eliminationist policies. One way to fight against this form of hate speech could be 'more speech', that is arguments within a free discussion against the

advocated policies (Yong, 2011, p. 400). Even though Yong has suggested restrictions, on this category of hate speech doesn't violate unjustly free speech rights and that it is covered as political speech. He asserts it is unprotected by the FSP, which makes it regulable. His position is silent on whether it should be regulated, because who would decide what speech counts as falling inside this category (Yong, 2011, p. 401). Yong makes this assertion based on the notion that no government could effectively make such a judgment of how this category of hate speech would be adopted, because it could change from one administration to the next and could lead to abuse. Regardless of his position on this category of hate speech, it is clear that it violates the FSP and therefore is regulable.

Assertions of fact and evaluative opinions are widely protected speech, because they cover arguments from truth, discovery, and democracy. Evaluative opinions involve all free speech justifications even if attacks on specific racial or religious occur (Yong, 2011, p. 401). He does not discount that assertions of fact and evaluative opinions cannot produce harm, but defends this category of speech as protected because of the powerful free speech interests and rights involved, and the relative effectiveness of the remedy of 'more speech' in these cases (Yong, 2011, p. 401). This category of speech has cognitive content and can be answered through deliberative and articulate speech.

Taylor defines hate speech as a type of group libel: speech (oral or written) that argues for the mental, physical, and/or ethical inferiority as undermining fair equality of opportunity for members of particular historically-oppressed groups (e.g., blacks, women, Jews, and homosexuals) (Taylor, 2012, p. 353-354). Taylor questions if

government restrictions on hate speech are consistent with liberty, and that the priority of liberty seems to forbid hate speech restriction (Taylor, 2012, pp. 353-354). He describes liberal egalitarians following Rawls, is committed to basic liberties, but has conflictions with their belief in socio-economic equality and a strong commitment to freedom of speech (Taylor, 2012, p.353).

Taylor distinguishes between speech "regulation" and "restriction." He uses the example of "time, place, and manner" rules as a qualifier of regulations on speech. Time, place, and manner rules make communication mutually consistent and protect the "central range of application" of free speech. Taylor states that restrictions on speech that would limit scientific or political doctrines would be prohibited, because the content is the target, which threatens liberal values related to open expression (Taylor, 2012, p. 354).

Taylor points out that very narrow limitations on speech content based on "fighting words," such as racial epithets used in confrontations could be regulated, so long as they do not threaten the free exercise of public reason and may protect the central range of application of other basic liberties. The limitations on hate speech which Taylor describes are *prima facie* restrictions, because they are at the heart of such free exercise, which depends on open access to all arguments regarding scientific and political matters (Taylor, 2012, p. 354).

Taylor tries to find the balance if any, for freedom of speech for both liberty of conscience and freedom of thought. He discusses how Mill, Rawls, and Thomas Scanlon have adopted "extremism in defense of liberty" in regards to free speech (Taylor, 2012, p. 355). Taylor holds that Mill, Rawls, and Scanlon would favor protecting

hate speech because of the civil libertarian aspect of their philosophies. Taylor assumes that liberals of all stripes are or should be civil libertarians with respect to speech, including hate speech. Taylor makes clear in his writing that he wishes to remain agnostic about hate speech as he has defined it. He stands by his assertion about "fighting words" (racial epithets) being regulated, because their limitation does not threaten free exercise of public reason, but he wants a balance with other central liberties, such as bodily security (Taylor, 2012, p. 355).

Taylor has his own set of principles when balancing free speech rights with what he calls the "priority of liberty." The priority of the equal-liberty (EL) principle over other principles of justice (e.g., the fair-equality-of-opportunity [FEO] principle or difference principle [DP]) and over other concerns as well (e.g., welfare, efficiency, perfection, piety, etc...), (Taylor, 2012, p. 354). Taylor contends that fairness is a quality of liberal theories, and most contemporary liberals (classical liberals and liberal egalitarians) have a civil libertarian viewpoint. He mentions that Rawls also supports the notion that some basic liberties may be "less essential" than others, and political liberties and the rights of fair equality of opportunity might be "less compelling" than that for "liberty of conscience and the rights defining the integrity of the person" (Taylor, 2012, p. 354-355).

Taylor illustrates that Mill, Rawls, and Scanlon would favor protecting hate speech because of the civil libertarian aspect of their philosophies. Let's assume a law is proposed to punish (through fines) advocating racial and sexually bigoted doctrines only on the grounds that said speech would hinder implementation of FEO, especially in the structures of college-admission committees and employers. Concerns over hate speech could contribute to socioeconomic inequality can be found throughout

philosophical and legal literature and case law (Taylor, 2012, p. 355-356).

The cause and effect is clear; speakers advocate bigoted doctrines and those the audience either complies (consciously or subconsciously) against historically-oppressed groups damaging the FEO principle (Taylor, 2012, p. 359). The priority of liberty is violated by restricting hate speech, however, FEO is realized, and therefore, there is a trade-off between EL and FEO. Nonideal Theory permits tradeoffs between basic liberties and opportunities/income if they promote “everyone’s interests” (Taylor, 2012, p. 358). When hate speech is uttered it is usually done so in historically embedded structures of social oppression by an aggressor that has deep social and psychological structures of domination and subordination. Because for hate speech to work the aggressor has to have a structure of power behind them that allows them speak with such force with authority under social, political, and historical conditions (Taylor, 2012, p. 360).

Taylor argues that restrictions on hate speech in attempts to curb historical injustices are could cause more harm than good, because it keeps in place the structural institutions of racism and sexism by creating power struggles from one group that has had power historically against a minority class that hasn’t held power traditionally. He points out that an approach to nonideal theory has worked in Scandinavian countries, which have been traditionally male dominated. Now women have equal power politically as well as in the home and in some cases are the majority bread winners (Taylor, 2012, p. 360). The structures may have been easier to overcome because they were based on sexism and not racism. Supporters of restricting hate speech in the U.S. rely on group-based structural oppressions.

Taylor concludes that regarding hate speech liberal egalitarians have to choose between free expression and equal educational and employment opportunities for historically-oppressed groups. He describes how libertarians regard free speech as the only place where *laissez faire* is still applicable. Liberals defend free speech and free association by claiming that redistribution of taxation does not violate autonomy, while libertarians are opposed to mandatory taxation for redistributive purposes (Taylor, 2012, p. 366). Laws regarding desegregation of schools and restaurants as well as affirmative action in hiring practices have done little to eliminate racism and sexism. Liberty and equality are placed in conflict, but equality takes priority over liberty, why should hate speech be treated any differently (Taylor, 2012, p. 366).

Taylor states he is on the other side of this debate, although his writing offered another point of view he questions that basic liberties should have strong priority over socioeconomic equality. Taylor wants liberal egalitarians to choose between liberty and equality regarding controversial issues including hate speech and other issues not related to this paper. He believes when liberal egalitarians finally choose between liberty and equality then they would be truly committed to liberalism, or not (Taylor, 2012, p. 366).

**In conclusion,** the racial component of speech in America towards African-Americans and other historically-oppressed groups by the KKK are similar to the racial rhetoric uttered by Nazi's in Europe. Burning a cross in an African-American's yard, is a symbolic act of hatred, virulent activity associated with hate speech. Swastikas references to the 'Third Reich', the Nazi flag, denying the Holocaust and the 'Heil Hitler' salute are all banned in Europe because of the racial component of that speech.

Europeans enacted statutes making it illegal to incite hatred, provoke violence, insult, and ridicule, or defame in a manner apt to breach the public peace regarding hate speech. In America, Congress passed the Civil Rights Act, Title VI and Title VII prohibits a racially hostile education and work environment. In addition, Congress has made it a crime to assault or kill a person with a clear racial motivation, perceived gender, sexual orientation, gender identity, or disability. Congress could pass a narrowly tailored statute directed at historically inflicted groups protecting them from hate speech in public places as the European have.

The Supreme Court has ruled that group libel is unprotected speech, because language aimed at racial and religious groups could lead to a breach of the peace, thus inciting imminent lawless action. "Fighting words" are not protected speech, because their very utterance can inflict injury and serves no intellectual purpose to advance society, such language does not express any exposition of ideas. For hate speech to be completely banned in the United States the Court would have to overturn *R.A.V.* and *Brandenburg*. Holding a Klan rally and advocating political reform through violence aimed at racial minorities' does incite imminent lawless action and would produce such an action. Burning a cross in an African-American family's yard is something a reasonable person of any race would find abhorrent, the act is to intimidate a person or group, particularly African-Americans and is in direct correlation with Nazi symbols and speech towards Jews in Europe. For these reasons hate speech in America should not be protected by the Constitution.

For equality to flourish us as a nation must continue to work for the protection of all citizens regardless of their individual characteristics. Strive to protect the dignity of

all human beings, and to prevent harmful, hateful speech towards one another, while protecting the First Amendment for only when we can respect each other with our speech only then will speech truly be free.



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